



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT OF KENYA

AT KISII

ELC NO. 24 OF 2017

JAMES NYAKUNDI OMWENGA (Suing as the legal representative of

the estate of FRANCIS OMWENGA OBANYO (DECEASED).....**PLAINTIFF**

VERSUS

RICHARD MAKORI NYAKUNDI**DEFENDANT**

J U D G M E N T

1. The plaintiff vide a plaint dated 31st January 2017 filed in court on the same date laid claim to land parcel **West Kitutu/Bokingoina/1559** ("the suit property") and sought the following orders against the defendant :-

(a) A declaration that the defendant is not entitled to land parcel No. West Kitutu/Bokingoina/1559 and an order of eviction do issue against him from the said land.

(b) A permanent injunction do issue against the defendant restraining by himself, servant, agent and/or any person acting under his instructions from remaining in occupation, cultivating, constructing, fencing or in any other manner interfering with parcel of land title No. West /Kitutu/Bokingoina/1559.

(c) Costs of this suit.

2. The defendant filed a defence and counterclaim dated 13th March 2017. The defendant denied that he was in unlawful occupation of the suit property and contended that he was legally in occupation of the suit property. He asserted he was entitled to a portion of the land by virtue of a customary trust subject to which the plaintiff held the suit property. By way of counterclaim the defendant stated that the father of the plaintiff, Obonyo Omwenga (deceased) held land parcel **West Kitutu/Bokingoina/1559** on behalf of himself and on behalf of the defendant's late father Nyakundi Nyangwono (deceased). Consequently the defendant /plaintiff in the counterclaim prayed for orders:-

(a) A declaration that Francis Omwenga Obonyo (deceased) held part of the suit land in trust and for the benefit of the plaintiff in the counter claim.

(b) An order directed against the defendant in the Counter claim to take out succession proceedings to the Estate of Francis Omwenga Obonyo and transfer to the plaintiff his rightful portion as demarcated on the ground within specific time lines failure to which the plaintiff be allowed to do succession.

(c) Costs of the suit.

3. The plaintiff testified as PW1 and called one Keremisa Nyaboke Obonyo who testified as PW2 in support of the plaintiff's case. The defendant testified and called two witnesses Geoffrey Magoi (DW2) and Zacharia Bogonko Nyachwani (DW3) in support of the defence case.

4. The plaintiff in his evidence before the court admitted that his father and the defendant's father were brothers. He further admitted in his evidence that his grandfather Obonyo Omwenga was the registered owner of the suit land property. The plaintiff testified that at the time succession proceedings were undertaken the defendant's father had died and the defendant was not staying on the suit land. The plaintiff further testified that the Land Disputes Tribunal had adjudicated the dispute and had awarded the defendant a portion of the suit land but upon challenge by his late father the decision was quashed by the High Court.

5. It was the defendant's further evidence that his grandfather had given the defendant's father land elsewhere and retained the suit property

in his name. The plaintiff explained that his grandfather was the only son to Omwenga Omwenga (great grandfather of plaintiff) who died when he was young and his wife (grandfather's mother) was married to another man one Monda and give birth to Nyamwono Monda and Nyachwani Monda who were the stepbrothers of the grandfather. It was the plaintiff's evidence that Nyamwono Monda, the defendant's father was given land by the plaintiff's grandfather which he sold before it was registered. The plaintiff further testified that the grandfather still gave the defendant's father another parcel of land being land parcel **West Kitutu/Bokingoina/1713** which is still registered in the grandfather's name (Obonyo Omwenga). The plaintiff testified that the defendant's father resided on this parcel of land and that is where he was buried when he died.

6. The plaintiff stated that the defendant only came to the suit property to take care of his aged grandfather but after his death the defendant started staking claim of ownership to the suit property. The plaintiff denied that the suit property was ancestral property. He stated that his grandfather and his father were the ones who were residing on the suit property and that his father's stepbrothers never claimed any land from him during his lifetime.

7. In cross examination the plaintiff stated he did not know the particulars of the land that had been given to the defendant's father. The plaintiff stated that he did not know why his father never included land parcel **1713** in the succession proceedings when he carried out succession for his late grandfather's estate.

8. PW2 Keremensia Nyaboke Obonyo was a sister to the plaintiff's father. It was her evidence that the defendant's father was given land by their father at Borabu (though she did not have particulars) which he sold and was further given land parcel **1713** where he built a house. She further stated the defendant came to look after her grandfather during his old age and affirmed the defendant had built his house on the suit land and resided thereon. She stated the house that had been built on land parcel **1713** was abandoned and collapsed owing to disuse.

9. The defendant, Richard Makori Nyakundi (DW1) testified that land parcel **1559** (the suit property) belonged to his grandfather (Agostono Obonyo Omwenga) and is now registered in the name of Obonyo Omwenga (the plaintiff's father) The defendant stated as at the time Obonyo Omwenga was registered his father was working at Kericho in the tea farms and when he returned Obonyo Omwenga did not give him his share of the land. He stated that instead Obonyo Omwenga showed him land parcel **West Kitutu (Bokingoina) 1714** which was registered in his name (Obonyo Omwenga's) and that was the land where the defendant and his father resided on until 1988 when the defendant's father died.

10. The further defendant testified that Obonyo Omwenga wanted the defendant's father to be buried on land parcel **1559** although he was ultimately buried on land parcel **1714** as there was resistance to him being buried in the suit property. The defendant stated that after the burial of his father Obonyo Omwenga insisted that the family of the defendant be relocated to land parcel **1559** as it was his intention to have the parcel of land partitioned so that the defendant's family were awarded half portion of the land. The defendant stated that the uncle set in motion the process of partitioning the land as evidenced by the application to the Land Control Board for subdivision, letter of consent for subdivision, and the mutation form for subdivision annexed to the defendant's bundle of documents dated 13th March 2017 and the supplementary bundle of documents dated 26th June 2018 admitted in evidence as "**DEX 1-5**" and "**DEX 6&7**" respectively .

11. He however stated the subdivision process was not completed as Obonyo Omwenga died in 2001 before the process had been completed.

12. The defendant testified further that following the death of his grandfather, the plaintiff's father processed succession to the estate of Obonyo Omwenga without any regard to the family of the defendant who were also beneficiaries of the estate of the deceased. He stated he lodged a caution against the title to safeguard his family's interest. He stated that he has lived on the suit land since 1999 and continues to live thereon todate.

13. In cross examination the defendant admitted he had filed a dispute at Marani Land Disputes Tribunal 2004. He affirmed that he never sought the revocation of the grant issued in favour of the plaintiff's father in regard to the estate of Obonyo Omwenga. He further stated the restriction on the title he had lodged was removed in unclear circumstances without any notification to him. He stated his family was relocated from land parcel **1714** to land parcel **1559** following intervention by elders. He stated his mother was buried on land parcel **1559** when she died in 2006.

14. DW2 Geoffrey Magoi was a retired chief. He stated he retired in 2004 and his evidence was to the effect that while he was serving as chief, he oversaw the subdivision of land parcel **1559**. He stated in his evidence as follows:-

"When I was serving as Chief I participated in overseeing the subdivision of land parcel 1559. Mzee Obonyo Omwenga was the one who had called us and he was demarcating his land for the defendant mother who was the wife of his brother. The husband to the defendant's mother had died.

15. DW3 Zacharia Bogonko Nyachwani adopted his recorded witness statement in his evidence. In cross examination he affirmed the defendant's father was buried in land parcel **1714**. He explained that before the defendant's father settled on land parcel **1714** which was in Obonyo Omwenga's name he had been working in the tea estates in Kericho. He stated the defendant's mother was built a house on the suit land in the 1990's and the house was still there .The witness stated he was born in 1972 in the tea estates where his father and the defendant's father were then working.

16. The parties filed final closing submissions after the close of the trial. I have reviewed the pleadings, the evidence adduced by the parties and I have considered the submissions by the parties and the following issues arise for determination

(i) Whether the defendant's occupation of land parcel West Kitutu/Bokingoina/1559 is unlawful and hence he ought to be evicted?

(ii) Whether a customary trust exists in favour of the defendant in regard to the suit land?

(iii) What reliefs should the court grant and in whose favour?

17. Francis Omwenga Obonyo (deceased) the father of the plaintiff, and Nyakundi Nyangwono Omwenga (deceased) the father of the defendants, were brothers. The grandfather to the plaintiff Obonyo Omwenga was a brother to the defendant's father and was therefore an uncle to the defendant. The plaintiff's grandfather was the elder brother to the defendant's father Nyangwono Omwenga also referred as Nyangwono Monda in the evidence. The undisputed evidence is that the plaintiff's grandfather had two brothers, Nyanchwani Omwenga and Nyakundi Nyangwono Omwenga although the plaintiff has endeavored to refer to them as stepbrothers. The grandfather of the plaintiff Obonyo Omwenga however accepted them as his brothers.

18. What is further not disputed is that the brothers to the said plaintiff's grandfather went to work in the tea estates during their youth and were not home when land adjudication was taking place in the 1970s.

19. It is the defendants evidence that Obonyo Omwenga who was his father's brother was registered as the owner of the family land Parcel **West Kitutu/Bokingoina/1559** to hold in trust on his own behalf and on behalf of his brothers. The abstract of title for land parcel **West Kitutu/Bokingoina/1559** shows the register for the parcels of land was opened on 24th May 1975 when Obonyo Omwenga was registered as owner. This was a first registration and there is no doubt it was born of the land consolidation and adjudication process. There is evidence through the abstracts of title in respect of land parcels **West Kitutu/Bokingoina/1713** and **1714** that Obonyo Omwenga was additionally registered as owner of the two parcels of land on the same date 24th May 1975 an indication that the two parcels of land also were product of the land adjudication process.

20. The copy of certificate of search for land parcel **West Kitutu/Bokingoina/311** submitted in evidence by the plaintiff shows that Nyanchwani Monda who as a brother (step brother) to Obonyo Omwenga was registered as owner of land parcel **West Kitutu/Bokingoina/311** on 24th May 1975 clearly suggesting that he was allocated the land following the process of land adjudication .Therefore, of the brothers of Obonyo Omwenga, only Nyakundi Nyangwono Omwenga the defendant's father, who does not appear to have been allocated any land during land adjudication. The plaintiff in his evidence and by the evidence of Pw2 suggested that the defendant's father was given land which he sold before the land was adjudicated and registered. No details or particulars of this alleged land was provided and on the evidence I am not able to find and hold that the defendant's father had been given land which he sold at the time of adjudication. There was no proof of that fact.

21. The defendant's position was that land parcels **1713** and **1714** were not ancestral as they were parcels of land that were purchased by Obonyo Omwenga and registered in his name during the process of land adjudication. He however was emphatic that land parcel **West Kitutu/Bokingoina /1559** was ancestral land and should have been shared amongst the brothers. It was on this land that Obonyo Omwenga had his home and when his brother, the father of the defendant died, he relocated his wife (mother of the defendant) and built a house for her in the suit land. The defendant's evidence was that when his father retired from Kericho, his brother rather than give him his share of the ancestral land parcel **1559** showed him another parcel of land **West Kitutu/Bokingoina/1714** where he resided until he died in 1988. The defendant's position was that his uncle, the plaintiff's grandfather was always aware that he was holding land parcel **1559** in trust for himself and the defendant's father and that was why he had desired him to be buried there which however did not happen.

22. DW2 Geoffrey Magoi who was a sub chief of the area testified that he knew the plaintiff's father very well and that it was him who invited the elders to partition the suit land for his late brother's widow . DW2 clarified that the other brother of Obonyo Omwenga, Nyachwani had his own land . According to DW2, by Obonyo Omwenga giving to his brother's widow a portion of land parcel **1559** was acknowledgment that he was holding the land in trust for himself and his late brother.

23. The court upon evaluation and analysis of the evidence is satisfied that indeed land parcel **West Kitutu/Bokingoina/1559** was ancestral land and before the land adjudication must have belonged to the father of Obonyo Omwenga and was family land.

24. On the issue whether the defendant is in occupation of the suit land unlawfully and as a trespasser my view is that his occupation is neither unlawful and neither would it constitute trespass. There is uncontroverted evidence that when the defendant's father died his mother and her family were voluntarily relocated to land parcel **West Kitutu/Bokingoina/1559** by Obonyo Omwenga who was the registered owner of the land. The defendant's mother was built a house on the land and the defendant also built a house thereon and has resided thereon since the 1990's. The defendant's mother and her son were buried on the suit land when they died. The occupation of the land by the defendant and members of the family was with the permission and sanction of Obonyo Omwenga who was the owner. The defendant and his family members have resided on the suit land for a long period of time and it is my determination and holding that the defendant's occupation of the suit land is not unlawful and does not constitute trespass.

Whether a customary trust arises.

25. The plaintiff has submitted that the defendant has failed to prove that a trust existed that could affect the property and besides has further submitted that the property having been subject of succession proceedings the defendant failed to challenge the grant that was issued in favour of Francis Omwenga Obonyo (now deceased) he cannot now purported to challenge the ownership of the suit property. The plaintiff has further submitted that Obonyo Omwenga (deceased) having been registered as owner of the suit property his rights as conferred under section 27 and 28 of the Registered Land Act Cap 300 Laws of Kenya (now repealed) were indefeasible. The plaintiff argued Customary Law rights, if any, were extinguished by registration, unless any claim was noted as an overriding interest on the register. The plaintiff placed reliance in support of his submission on the cases of *Elizabeth W Wanjohi & others -Vs- Official Receiver & Interim Liquidator CACA NAI 40 of 1988*, *Esiroyo -Vs- Esiroyo (1973) EA 388* and *Kiaria -Vs- Mathune & others CA 42 of 1978* (unreported)

26. The defendant placing reliance on section 28(b) of the Land Registration Act 2012 maintained that the defendant had established the existence of a trust in his favour and ought to be granted the reliefs prayed for in the counterclaim while the plaintiff's suit should be dismissed.

27. The issue of what constitutes or amounts to customary trust in the context of land registered under the repealed Registered Land Act, Cap 300 Laws of Kenya and the Land Registration Act No. 3 of 2012 has been the subject of exhaustive discussion and analysis by the Supreme Court of Kenya in Petition No. 10 of 2015 *Isack M’Inanga Kiebia –vs- Isaaya Theuri M’Litantari & Another 2018* eKLR. The Supreme Court outlined and considered the application of sections 27 (a) 28 and 30 (g) of the Registered Land Act, Cap 300 Laws of Kenya in the context of judicial pronouncements in the case of *Obiero -Vs- Opiyo (1972) EA 227 and Esiroyo –Vs- Esiroyo (1973) EA 388* where the court had emphatically stated that upon registration of land, customary rights get extinguished and did not qualify as overriding interests that required no registration under section 30(g) of the Registered Land Act.

Section 27(a) of the Registered Land Act (repealed) provides that:-

“The registration of a person as proprietor of Land shall vest in that person the absolute ownership of that land together with all rights and privileges belonging or appurtenant thereto”

Section 28 of the said Act provides that :-

The rights of a proprietor, whether acquired on first registration or whether acquired subsequently for valuable consideration or by an order of court shall not be liable to be defeated except as provided in this Act and shall be held by the proprietor, together with all privileges and appurtenances belonging thereto, and claims whatsoever, but subject to:-

(a) To the leases and other encumbrances and to the conditions and restrictions if any, shown in the register, and

(b) Unless the contrary is expressed in the register, to such liabilities, rights and interests as affected the same and are declared by section 30 not to require nothing on the register;

provided that nothing in this section shall be taken to relieve a proprietor from any duty or obligation to which he is subject as a trustee.

Section 30 (g) in turn provides that: -

Unless the contrary is expressed in the register, all registered land shall be subject to such of the following overriding interests as may for the time being subsist and affect the same, without their being noted on the register-

(g) the rights of a person in possession or actual occupation of land to which he is entitled in right only of such possession or occupation, save where inquiry is made of such person and the rights are not disclosed

28. In the case of *Obiero - Vs- Opiyo (supra)* Bennet, J held that Customary Law became extinguished upon registration of the land. He stated as follows:-

“—section 28 of the Registered Land Act confers upon a registered proprietor a title free from all other interests, and claims whatsoever, subject to the leases, charges and encumbrances shown in the register and such overriding interests as are not required to be noted in the register---- Rights arising under customary law are not among the interests listed in S.30 of the Act as overriding interests. Had the legislative intended that the rights of a registered proprietor were to be subject to the rights of any person under customary law, nothing could be easier than for it to say so”.

29. Kneller, J in *Esiroyo –Vs- Esiroyo (supra)* reaffirmed the reasoning in the above case. He stated that :-

“The matter (claim of interested in registered land) is taken out of the purview of customary, law by the provisions of the Registered Land Act --- The rights of the defendant under customary law have been extinguished. Section 28 of the Registered Land Act confers upon a registered proprietor a title free from all other interested and claims whatsoever, subject to the leases, charges and encumbrances shown in the register and such overriding interests not quoted in the register.—Rights arising under customary Law are not among the interest listed in section 30 of the Act as overriding interests.

30. The application of these two decisions by the courts over time had serious implications as it meant a registered title in the hands of a proprietor could be used to completely obscure valid interests of persons who under customary law had rights to the land in regard to which a proprietor had somehow gotten himself registered as proprietor, never mind how. Without doubt the rigid application of the *ratio decidendi* in the two decisions could and must have led the courts to unwillingly or unwittingly occasion injustice as persons who had equitable rights courtesy of customary law somehow had their rights over land wiped out. It is no wonder therefore the courts over time had to find some escape route from the strictures of the *Obiero –Vs- Opiyo*, and *Esiroyo –Vs- Esiroyo* decisions. See *Alan Kiama –Vs- Ndia Mathunya & others CA 42 of 1978*, Madam JA and *Kanyi –Vs- Muthiora (1984) KLR 712* Nyarangi JA where the Court of Appeal somehow acknowledged customary law to be an overriding interest applying the *provisio* under section 28 of the Registered Land Act.

31. The Supreme Court in the case of *Isack M’Inanga Kiebia –Vs- Isaaya Theuri M’Lintari & Another* case (*supra*) after analysis of case law and relevant provisions of the Registered Land Act highlighted herein above under paragraph 52 in their judgment stated as follows :-

Flowing from this analysis, we now declare that a customary trust, as long as the same can be proved to subsist, upon a first registration, is one of the trusts to which a registered proprietor, is subject under the *provisio* to Section 28 of the Registered

Land Act. Under this legal regime, (now repealed), the content of such a trust can take several forms. For example, it may emerge through evidence, that part of the land, now registered, was always reserved for family or clan uses, such as burials, and other traditional rites. It could also be that other parts of the land, depending on the specific group or family setting, were reserved for various future uses, such as construction of houses and other amenities by youths graduating into manhood. The categories of a customary trust are therefore not closed. It is for the court to make a determination, on the basis of evidence, as to which category of such a trust subsists as to bind the registered proprietor.

Each case has to be determined on its own merits and quality of evidence. It is not every claim of a right to land that will qualify as a customary trust. In this regard, we agree with the High Court in *Kiarie v. Kinuthia*, that what is essential is the nature of the holding of the land and intention of the parties. If the said holding is for the benefit of other members of the family, then a customary trust would be presumed to have been created in favour of such other members, whether or not they are in possession or actual occupation of the land. Some of the elements that would qualify a claimant as a trustee are:

- 1. The land in question was before registration, family, clan or group land**
- 2. The claimant belongs to such family, clan, or group**
- 3. The relationship of the claimant to such family, clan or group is not so remote or tenuous as to make his/her claim idle or adventurous.**
- 4. The claimant could have been entitled to be registered as an owner or other beneficiary of the land but for some intervening circumstances.**
- 5. The claim is directed against the registered proprietor who is a member of the family, clan or group.**

32. Under paragraph 53 of the judgment the Supreme Court in fact declared the principle enunciated in **Obiero –Vs- Opiyo and Esiroyo – Vs- Esiroyo** as bad Law. The court stated as follows:-

We also declare that, rights of a person in possession or actual occupation under Section 30(g) of the Registered Land Act, are customary rights. This statement of legal principle, therefore reverses the age old pronouncements to the contrary in *Obiero v. Opiyo and Esiroyo v. Esiroyo*. Once it is concluded, that such rights subsist, a court need not fall back upon a customary trust to accord them legal sanctity, since they are already recognized by statute as overriding interests.

33. The plaintiff's reliance therefore on the holding in *Esiroyo –Vs- Esiroyo* case is not sustainable in the face of developments in the law. As held and stated by the Supreme Court the holding in *Esiroyo –Vs- Esiroyo* that customary right are extinguished by mere registration of land was bad law.

34. The Land Registration Act, 2012 enacted following the repeal of the Registered Land Act (Cap 300) under section 28(b) expressly acknowledged customary trust to be overriding interests over registered land which did not require noting in the register. This express recognition removed any ambiguity that the previous provisions in the Registered Land Act (Cap 300) may have presented in regard to the position of customary Law in regard to registered land.

35. In the present matter I have held that the suit property constituted ancestral land and that the defendant's father having been a brother to Obonyo Omwenga was entitled to a share of the ancestral land. The defendant's other brother Nyanchwani Monda (Omwenga) got land parcel **311** which was registered in his name at the time of land adjudication. This parcel of land as per the title abstract measured 0.50 Ha While land parcel **1559** measures approximately 1.2 Ha slightly two times larger than parcels 311. Land parcels **1713 & 1714** each measured 0.07 Ha and were essentially small parcels which it is possible Obonyo Omwenga could have purchased himself. However land parcel 1559 was where the family had resided and even the defendant still resides thereon. I agree with defendant it was ancestral land. The deceased Obonyo Omwenga in my view was registered to hold the same in trust for himself and the defendant's father who was his brother. Following the death of the defendant's father the trust continued in favour of the dependants of the deceased who included the deceased widow and the children.

36. The plaintiff's father therefore held the suit property subject to the defendant's family customary law overriding rights. The succession proceedings that the plaintiff's deceased father undertook in 2002 which resulted in him being registered as the absolute owner of land parcel **West Kitutu/Bokingoina/1559** was subject to the overriding interests that the deceased had held the title upon. The overriding interest were such as did not require noting in the register. The title is therefore held in the name of the deceased Francis Omwenga Obonyo in trust for his estate and the defendant.

37. In the final a result it is my determination that the plaintiff has not proved his suit against the defendant on a balance of probabilities and I hereby order the dismissal of the same. On the other hand, I find that the defendant has proved his counterclaim on a balance of probabilities. I hold that Francis Omwenga Obonyo (deceased) held part of land parcel **West Kitutu/Bokingoina/1559** in trust for the defendant. I accordingly order that appropriate succession proceedings in regard to the estate of Francis Omwenga Obonyo (deceased) be undertaken and that the portion of land parcel **West Kututu/Bokingoina/1559** presently physically demarcated and occupied by the defendant on the ground be excised and transferred to the defendant **Richard Makori Nyakundi** absolutely in discharge of the trust in his favour.

38. Costs are at the discretion of the Court. I have considered that this is essentially a family dispute and having regard to all the attendant circumstances I have determined it would be onerous to burden either party with costs. I order that each party bears their own costs of the suit and the counterclaim.

39. Orders accordingly.

JUDGMENT DATED AND SIGNED AT NAKURU THIS 29TH DAY OF OCTOBER 2019.

J. M. MUTUNGI

JUDGE

JUDGMENT DELIVERED AT KISII THIS 7TH DAY OF NOVEMBER 2019.

J M ONYANGO

JUDGE